

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: 8-220200.2

DATE: April 15, 1986

MATTER OF: Colleague, Inc.--Request for
Reconsideration

DIGEST:

Where, on the basis of protester's refutation of factual conclusion in prior decision, protester argues that the contracting agency deliberately prevented it from competing by failing to provide protester a copy of a material amendment, prior decision is affirmed since the record does not support the protester's allegations. Additional information provided by protester does not warrant reversal or modification of previous decision.

Colleague, Inc., requests reconsideration of our decision in Colleague, Inc., B-220200, Nov. 25, 1985, 85-2 C.P.D. ¶ 598, in which we denied its protest of the rejection of its ostensibly low bid for failure to acknowledge receipt of a material amendment. Colleague's bid was submitted in response to invitation for bids (IFB) No. FNP-F1-1732-A-7-10-85 issued by the General Services Administration (GSA) to satisfy its annual requirements for seven items of portable and wall-mounted blackboards.

The prior decision is affirmed.

The thesis of Colleague's protest is that GSA, in a conscious and deliberate effort to preclude it and possibly other bidders from competing, issued a material amendment to the solicitation 1 day prior to the initially established bid opening date, but mailed the amendment only to those firms whose names appeared on certain pages of the mailing list marked with double asterisks. This is "the only possible explanation" for its failure to receive a copy of the amendment, Colleague maintains, noting that receipt of the amendment was acknowledged only by firms whose names were on those pages.

We denied Colleague's protest because, based on the entire record, the protester did not prove that the agency deliberately failed to mail it a copy of the amendment or that the agency otherwise consciously excluded it from the competition. Concerning Colleague's allegation that the

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agency mailed copies of the amendment only to bidders listed on pages bearing asterisk marks, we noted that at least one bidder who acknowledged the amendment was not listed on those pages. In the absence of a showing by Colleague that the agency consciously and deliberately excluded it from the competition, we held that its bid was properly rejected as nonresponsive, since the bidder bears the risk of nonreceipt of a solicitation amendment. General Atronics Corp., B-217305, Jan. 4, 1985, 85-1 C.P.D. ¶ 20.

In its request for reconsideration, Colleague contends that our previous decision was erroneous because it was "founded on" the factually incorrect conclusion that at least one of the bidders who acknowledged the amendment was not listed on any of the asterisked pages. The protester states that of the bidders that acknowledged the amendment, one is listed on an asterisked page under another company name. On the basis of its allegation that the amendment was sent only to bidders on the marked pages, the protester argues that the record "establishes" that GSA did not mail a copy of the amendment to Colleague, among others, who were not listed on the referenced pages.

GSA maintains that a copy of the amendment was mailed to all bidders that had been provided a copy of the original solicitation, including Colleague. In this regard, GSA has submitted an affidavit of the contract specialist who prepared the amendment and mailed copies to the solicited firms, so attesting. Although the agency has provided no explanation of the significance of the asterisks on certain pages of the mailing list,^{1/} it denies that it deliberately attempted to exclude Colleague or any other bidders from the competition or to influence the outcome of the bidding.

In its request for reconsideration, the protester also complains that during a telephone conversation between one of its officials and the contract specialist prior to bid opening, the contract specialist failed to advise the protester that an amendment was being considered and did not include Colleague in a survey of contractors who had bid on

^{1/} According to Colleague, the contract specialist reported, through agency channels, that he has no knowledge of what the asterisks denote.

previous solicitations for the item regarding the feasibility of the amendment it was then considering. As we stated in addressing this argument in our original decision, since the agency apparently had not reached a final decision concerning issuance of the amendment, Colleague was properly advised of the then-current status of the solicitation and bidding schedule as advertised, and the protester does not deny that it was not a member of the group of previous bidders to which the agency restricted its survey.

Colleague is correct, however, in its assertion that all the bidders (including one listed under a different company name) who acknowledged receipt of the amendment were listed on the asterisked pages. However, we do not agree with the protester's conclusion that, based upon this fact, the record establishes that the agency deliberately failed to furnish Colleague a copy of the amendment for the purpose of excluding it from the competition.

As we noted in our previous decision, the record shows that the agency advised bidders in attendance for the initially scheduled bid opening of the changes made by the amendment, publicly posted a notice of the amendment and extended the bid opening by 12 days to allow all bidders adequate time to receive and acknowledge that amendment, as well as to modify their bids if they so chose. In regard to the agency's mailing of the amendment, GSA has submitted an affidavit of its contract specialist who was in charge of this procurement. The affidavit, dated January 1, 1986, states:

"I, the undersigned, to the best of my knowledge and belief, hereby certify that Amendment Number 1 to Solicitation Number FNP-F1-1732-A-7-10-85 (extended to 7-22-85) was mailed on the afternoon of July 9, 1985, to all firms whose names appear on the handwritten mailing list submitted under Tab H, pages 1 through 27, of GAO Case Number B-220200. This handwritten mailing list was also used to distribute the original solicitation. I personally took the amendments to the Woodbridge Post Office in Virginia and placed them in the hands of a U.S. Postal employee."

In light of the actions on the agency's part to publicize the amendment and the affidavit of the contract specialist certifying that he mailed a copy of the amendment to all firms on the bidders mailing list, the record cannot

be said to establish that GSA acted deliberately to exclude certain bidders or to thwart competition. Moreover, as a result of the agency's transmission of the amendment and extension of the bid opening date to allow bidders sufficient time to respond, adequate competition was obtained in that four responsive bids were received. Under these circumstances, we will not infer on the basis of the information now before us that the agency engaged in improper procurement practices. We thus conclude that reversal or modification of our previous decision is not warranted.

However, notwithstanding the evidence of record regarding the agency's actions to inform bidders of the amendment, we find it highly unusual that, after the contract specialist mailed a copy of the amendment to each of the 115 firms on the handwritten bidders mailing list, only four of nine bidders acknowledged receipt of the amendment and the names of each of those four firms were among the entries on those pages marked by asterisks. The anomaly of this situation is underscored by the fact that the agency has offered no explanation for the comparatively low number of acknowledgements in relation to the number of bids submitted, or for the asterisked pages of the bidders mailing list, or for the fact that all the bidders who acknowledged the amendment were listed on those pages. Given the general nature of this procurement and the manner in which the agency states the amendment was issued and publicized, a majority of the bidders should not fail to acknowledge receipt of the amendment. Thus, while the record does not establish that GSA deliberately sought to preclude Colleague or other firms from competing, it does suggest that there may well have been some deficiency in the way in which the amendment was transmitted to bidders.

This procurement was subject to the Competition in Contracting Act of 1984 (CICA) and, therefore, GSA was to use "full and open competitive procedures." See 41 U.S.C.A. §§ 253(a)(1)(A), 253a(a)(1), and 403(6)-403(7) (West Supp. 1985); see also Trans World Maintenance, B-220947, Mar. 11, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ ___ at 3. Congress established "full and open" competition as the new required standard for awarding contracts because of its strong belief "that the procurement process should be open to all capable contractors who want to do business with the Government." House Conference Rep. No. 98-861, 98th Cong., 2d Sess. 1422 (June 23, 1984). The congressional mandate for "full and open" competition is vitiated where, as in this case, a majority of the bids received are nonresponsive for failure to acknowledge receipt of an amendment. This suggests a significant

failure in the competitive process, even if not the result of deliberate action to exclude any bidder.

Since a failure to achieve "full and open" competition should, if practicable, be remedied through a resolicitation in which all capable prospective contractors have an opportunity to compete, we think it would have been appropriate for GSA to have rejected all bids and resolicited when it became apparent that a majority of the bids were nonresponsive for failure to acknowledge receipt of the amendment. Accordingly, we recommend to the GSA that, in the future, it take appropriate action to assure that procurements are conducted in a manner that provides such an opportunity to capable contractors seeking to do business with the government.

Harry R. Van Cleve

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